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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

I-FLOW CORPORATION, a Delaware corporation,

Plaintiff,

vs.

ZONE MEDICAL, LLC, a California limited liability company,

Defendant.

Case No. 08-CV-0057 – JAH (WMc)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS UNDER FED. R. CIV. P. 12(B)(6) OR, IN THE ALTERNATIVE, MOTION TO STAY.

Date: March 3, 2008
Time: 2:30 p.m.
Place: 940 Front St, San Diego, Court Room 11, 2nd Fl.

Judge: Hon. John A. Houston

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STATUTES AND RULES

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Defendant Zone Medical, LLC (“Zone”) hereby submits this Memorandum of Points and Authorities in Support of its Motion to Dismiss plaintiff I-Flow Corporation's (“I-Flow”) Complaint pursuant to Fed. R. Civ. P. 12(b)(6) ("Rule 12(b)(6)") or, in the alternative, to stay.

INTRODUCTION

Zone moves to dismiss the complaint under Rule 12(b)(6) because I-Flow engages in *claim splitting* under this Court's ruling in *Single Chip Systems Corp. v. Intermec IP Corp.*, 495 F. Supp. 2d 1052 (S.D. Cal. 2007) over case number 07-cv-1200-DMS (NLS) before this Court, filed June 29, 2007 ("2007 action") and currently pending.

In this case *and* in the 2007 action, I-Flow asserts U.S. Patent No. 5,284,481 ("'481 patent") against an infusion pump called SOLACE ("SOLACE pump"), in other words, the exact same transactions are alleged to infringe (the making, using and selling of the SOLACE pump). I-Flow names two defendants in the 2007 action, Apex Medical Technologies, Inc. ("Apex") and Mark McGlothlin, the CEO of Apex ("McGlothlin"). The interests of Apex and Zone are closely aligned with respect to I-Flow's claim of patent infringement under the '481 patent against the SOLACE pump because Apex makes and Zone markets the SOLACE pump. In other words, Apex and Zone represent the same interest with respect to the patent infringement claim that I-Flow asserts in the 2007 action and in this case.

As explained in *Single Chip Systems*, if one *assumes* that the 2007 action was final, claim preclusion would bar this action. Therefore, as the 2007 action is still pending, this action is instead precluded under the doctrine of claim splitting. This case should therefore be dismissed under Rule 12(b)(6).

In the alternative, Zone moves for an order to stay this action. On January 16, 2008, the U.S. Patent Office issued an Order Granting Request for Ex Parte Reexamination of the '481 patent. Reexamination of the '481 patent will likely simplify issues and possibly resolve this case entirely. The reexamination can also assist the parties in resolving this case without further assistance of the Court. Also, I-Flow would not be prejudiced by a stay because this case is still in the very early stages as the pleadings have not been finalized, case scheduling has not begun, no trial date has been set, and the parties have not engaged in any discovery.

STATEMENT OF FACT

A. The 2007 Action.

1. The Complaint.

On June 29, 2007, I-Flow filed the complaint in the 2007 action, *i.e.*, case number 07-cv-1200-DMS (NLS) ("2007 complaint"), which is currently pending before this Court. The 2007 complaint names Apex Medical Technologies, Inc. as the sole defendant and it alleges infringement of the '481 patent as the sole claim. Declaration of Norbert Stahl filed herewith ("Stahl Dec."), Ex. A, p. 1.

The 2007 complaint identifies the place of business for Apex as:

> 10064 Mesa Ridge Court, Ste 202
> San Diego, CA 92121.

Stahl Dec., Ex. A, ¶5.

The 2007 complaint asserts only the '481 patent (Stahl Dec., Ex. A, ¶7) and identifies the SOLACE pump as the sole product accused of infringement:

> Defendant's SOLACE™ Post-Operative Pain Relief Infusion System includes an infusion pump (the "SOLACE™ Infusion Pump") that is covered by the '481 patent.

Stahl Dec., Ex. A, ¶8.

The 2007 complaint seeks monetary damages (Stahl Dec., Ex. A, ¶C) and an injunction against Apex and everyone acting in concert with Apex:

> An injunction enjoining Defendant, its officers, directors, agents, servants, employees and attorneys, and *those persons in active concert or participation with Defendant*, from directly or indirectly infringing the '481 patent in violation of 35 U.S.C. § 271;

Stahl Dec., Ex. A, ¶B (emphasis added).

//

2. The Second Amended Complaint.

On January 14, 2008, I-Flow filed a "Second Amended Complaint for Patent Infringement; Trade Secret Misappropriation; Breach of Confidence; and Common Law and Statutory Unfair Competition" in the 2007 action ("amended complaint"). The amended complaint adds four causes of actions and it names Mark McGlothlin as an additional defendant. Stahl Dec., Ex. B, p. 6. The amended complaint asserts that McGlothlin "is the President and CEO of Defendant Apex." Stahl Dec., Ex. B, ¶6.

Apex and McGlothlin have not yet answered the Second Amended Complaint in the 2007 action. Also, I-Flow filed a First Amended Complaint in the 2007 action but agreed to further amend it to address various deficiencies, thus resulting in the Second Amended Complaint.

The amended complaint also asserts only the '481 patent (Stahl Dec., Ex. B, ¶8) and identifies the SOLACE pump as the sole product accused of infringement:

> Defendants' SOLACE™ Post-Operative Pain Relief Infusion System includes an infusion pump (the "SOLACE™ Infusion Pump") that is covered by the '481 patent.

Stahl Dec., Ex. B, ¶9.

The amended complaint alleges infringement of the '481 patent by the SOLACE pump by Apex and McGlothlin (Stahl Dec., Ex. B, ¶¶24-25) and seeks monetary damages (Stahl Dec., Ex. B, ¶C) and an injunction against them and "those persons in active concert or participating with" them (as does the 2007 complaint against Apex). Stahl Dec., Ex. B, ¶B.

B. The Current Action.

On January 10, 2008, or *four days prior to filing its amended complaint in the 2007 action*, I-Flow filed the complaint in this case ("2008 complaint"). The 2008 complaint names Zone as the sole defendant and it alleges infringement of the '481 patent as the sole claim.

The 2008 complaint identifies the place of business for Zone at the same address as for Apex (suite 200 instead of 202, *supra*):

10064 Mesa Ridge Court, Ste 200
San Diego, CA 92121.

2008 complaint, ¶5.

Like the 2007 complaint and the amended complaint, the 2008 complaint asserts only the '481 patent (2008 complaint, ¶7) and identifies the SOLACE pump as the sole product accused of infringement:

> [T]he SOLACE^{TM} Post-Operative Pain Relief Infusion System, marketed by Defendant Zone, includes an infusion pump (the "SOLACE^{TM} Infusion Pump") that is covered by the '481 patent.

2008 complaint, ¶8.

The 2008 complaint also seeks monetary damages (2008 complaint, ¶C) and an injunction of Zone and "those persons in active concert or participating with" Zone against alleged infringement of the '481 patent. 2008 complaint, ¶B.

C. Reexamination of the '481 Patent.

On January 16, 2008, the U.S. Patent and Trademark Office granted a request for *ex parte* reexamination of the '481 patent. Stahl Dec., Ex. C, pp. 20-22. *All* claims of the '481 patent are the subject of the reexamination. Stahl Dec., Ex. C, p. 23.

ARGUMENT

A. The 2008 Complaint Fails to State a Claim on Which Relief May Be Granted in View of the 2007 Action.

1. The Rule 12(b)(6) Standard.

Zone moves under Rule 12(b)(6) to dismiss I-Flow's 2008 complaint for failure to state a cause of action on which relief may be granted in view of I-Flow's 2007 action currently before this Court against privies of Zone. On a motion under Rule 12(b)(6), "[a]ll allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party." *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 337-8 (9th Cir. 1996). When ruling on the motion, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

When evaluating pleadings under Rule 12(b)(6), "[d]ismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988). Also, a court "need not accept as true conclusory allegations or legal characterizations. Nor need it accept unreasonable inferences or unwarranted deductions of fact." *Groubert v. Spyglass Entertainment Group, LP*, 2002 U.S. Dist. LEXIS 17769, *4 (C.D. Cal. 2002). And, "[n]or need the Court assume that Plaintiff can prove facts different from those he has alleged." *Id.*

2. To Prevent Harassment, Claim Splitting Bars I-Flow From Bringing the Controversy of the 2007 Action in This Case.

As explained by this Court, "[t]he doctrine of claim splitting bars a party from subsequent litigation where the 'same controversy' exists." *Single Chip Systems Corp.*, 495 F. Supp. 2d at 1058 (citation omitted). "The 'main purpose behind the rule preventing claim splitting is to protect the defendant from being harassed by repetitive actions based on the same claim.'" *Id.* at 1058.

While "the doctrine of claim splitting is an aspect of res judicata," *id.* at 1058, "the doctrine of claim splitting, unlike *res judicata*, does not require a final judgment on the merits" in the first action before it can bar the second action, *id.* at 1059 ("[W]hat is required in the context of a claim-splitting analysis is to *assume* that the first suit was final, and then determine if the second suit could be precluded." *Id.*, emphasis original). In *Single Chip Systems*, this Court relied on *Adams v. California Dep't of Health Services*, 487 F.3d 684 (9th Cir. 2007), where the 9th Circuit quoted from opinions of the U.S. Supreme Court and the 2nd, 6th, and 10th Circuits to support the proposition that claim splitting does not require a final judgment in the first suit to bar a second suit on the same claim. *Adams*, 487 F.3d at 689.

The doctrine of claim splitting was also embraced by the Federal Circuit, holding that a party *must raise in a single lawsuit all grounds of recovery* arising form a single transaction, or series of transactions, *that can be brought together*:

> It is well established that a party may not split a cause of action into separate grounds of recovery and raise the separate grounds in

> successive lawsuits; instead, a party must raise in a single lawsuit all the grounds of recovery arising from a single transaction or series of transactions that can be brought together. *See Restatement (Second) of Judgments § 24(2)* (1982) (all actions arising from the same transaction or series of transactions are regarded as constituting a single cause of action);

Mars Inc. v. Nippon Conlux Kabushiki-Kaisha, 58 F.3d 616, 619 (Fed. Cir. 1995).

This case and the 2007 action clearly arise from the same series of transactions (making and marketing of the SOLACE pump; Stahl Dec., Ex. A, ¶8, Ex. B, ¶9; 2008 complaint, ¶8) and I-Flow asserts the same right (any rights I-Flow may have under the '481 patent; Stahl Dec., Ex. A, ¶7, Ex. B, ¶8; 2008 complaint, ¶7) and all actions arising from the application of the '481 patent to the SOLACE pump therefore constitute a single cause of action. It follows that I-Flow *must* raise in a *single* lawsuit all grounds of recovery arising therefrom and I-Flow may not split the cause of action into the 2007 action and this separate lawsuit. *Mars, supra*. This case should therefore be dismissed.

3. The Complaint in this Case Is Duplicative of the Complaint in the 2007 Action and Dismissal Is Therefore Proper.

The complaint in this case is duplicative of the complaint in the 2007 action and therefore subject to dismissal under Rule 12(b)(6). The 9th Circuit explained that "in assessing whether the second action is duplicative of the first, we examine whether the causes of action and relief sought, as well as the parties or privies to the action, are the same." *Adams*, 487 F.3d at 689 (quoting *United States v. The Haytian Republic*, 154 U.S. 118, 124 (1894) that "'[t]here must be the same parties, or, at least, such as represent the same interests; there must be the same rights asserted and the same relief prayed for; the relief must be founded upon the same facts, and the . . . essential basis, of the relief sought must be the same.'" At 689.).

The causes of action in the 2007 action and in this case are the same as I-Flow alleges in both that the '481 patent covers the SOLACE pump. Also, the validity and enforceability of the '481 patent is challenged in the 2007 action and the identical challenges to validity and enforceability of the '481 patent would be presented in this case too (*i.e.*, I-Flow's decision to duplicate its patent infringement allegations of the 2007 action in this suit would force Zone to duplicate the validity and enforceability challenges to the '481 patent).

Also, the parties in the 2007 action and in this case "represent the same interests" and are privies. Zone markets the SOLACE pump of Apex, as is acknowledged in the complaint in this case. 2008 complaint, ¶8.

This case should therefore be dismissed.

a. The Complaint in this Case Includes the Same Cause of Action for Patent Infringement as the Complaint in the 2007 Action.

The 9th Circuit applies the transaction test to determine whether the causes of action in two suits are identical, examining four criteria:

> (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

Adams, 487 F.3d at 689 (further holding that the last of these criteria is the most important).

Here, the first criterion is satisfied because infringement, validity and enforceability of the same patent are at issue in the 2007 action and in this case (Stahl Dec., Ex. A, ¶7, Ex. B, ¶8; 2008 complaint, ¶7). Also, the same product is accused of infringement (Stahl Dec., Ex. A, ¶8, Ex. B, ¶9; 2008 complaint, ¶8). Inconsistent outcomes could result so that this action could "destroy[] or impair[]" any of the "rights or interests established" in the 2007 action. *Adams, supra*.

The second criterion is also satisfied because the evidence would be virtually identical in both the 2007 action and in this case (again, same patent, same product, same sales because Zone markets Apex' product, *e.g.*, 2008 complaint, ¶8.).

The third criterion is satisfied because the right that I-Flow alleges as infringed are the patent rights, if any, under the '481 patent (Stahl Dec., Ex. A, ¶7, Ex. B, ¶8; 2008 complaint, ¶7).

Finally, the fourth criterion, the most important according to *Adams* (at 689), is satisfied because the nucleus of facts is the same in the 2007 action and in this case, *i.e.*, the relevance of the same product (the SOLACE pump) to the claims of the same patent (the '481 patent), and the same challenges of the patent, involves the same facts in both cases.

In conclusion, the patent infringement cause of action in the 2007 action is identical to the sole cause of action in this case.

b. The Complaint in this Case Names a Party Who is a Privy of the Parties in the 2007 Action.

Apex and Zone are privies because they represent the same interest at issue in the 2007 action and in this case, *i.e.*, I-Flow's claim of infringement of the SOLACE pump under the '481 patent. The 9th Circuit explained the concept of privity for *res judicata* as follows:

> "Privity" - for the purposes of applying the doctrine of *res judicata* - is a legal conclusion "designating a person so identified in interest with a party to former litigation that he represents precisely the same right in respect to the subject matter involved."

Edwin v. Schimmels, 127 F.3d 875, 881 (9th Cir. 1997).

Privity has been found "where the interests of the nonparty and party are "so closely aligned as to be 'virtually representative,'" *id.* at 881.

Here, Zone and Apex clearly "represent[] precisely the same right in respect to the subject matter involved," *i.e.*, the relevance of the SOLACE pump (Stahl Dec., Ex. A, ¶8, Ex. B, ¶9; 2008 complaint, ¶8) to the '481 patent (Stahl Dec., Ex. A, ¶7, Ex. B, ¶8; 2008 complaint, ¶7) and the validity and enforceability of the '481 patent. The interests of Zone and Apex are fully aligned on this "subject matter" because both are adverse to the '481 patent and both represent the SOLACE pump so that Zone and Apex are in privity with respect to I-Flow's patent infringement claim under the '481 patent regarding the SOLACE pump.

Also, I-Flow seeks relief for alleged infringement of the '481 patent in this case and the 2007 action by "those persons in active concert or participating with" the Zone, and Apex and McGlothlin, respectively. Stahl Dec., Ex. A, ¶B, Ex. B, ¶B; 2008 complaint, ¶B.

In conclusion, this case should be dismissed under the doctrine of claim splitting pursuant to the 9th Circuit in *Adams* and the Federal Circuit in *Mars* as explained by this Court in *Single Chip Systems*.

B. In the Alternative, this Case Should Be Stayed in View of the Reexamination of the '481 Patent.

If the Court does not grant the motion to dismiss, Zone moves in the alternative for an order to stay this case pending the outcome of a reexamination of all claims of the '481 patent that was granted on January 16, 2008. Stahl Dec., Ex. C, pp. 20-23.

This Court may stay this case pending reexamination of the '481 patent because "[c]ourts have inherent power to manage their dockets and stay proceedings, ... including the authority to order a stay pending conclusion of a PTO examination." *Ethicon, Inc. v. Quigg*, 849 F.2d 1422, 1426-27 (Fed. Cir. 1988) (citations omitted).

"There is 'a liberal policy in favor of granting motions to stay proceedings pending the outcome' of reexamination, especially in cases that are still in the initial stages of litigation and where there has been little or no discovery." *Tse v. Apple Inc.*, 2007 U.S. Dist. LEXIS 76521, *4 (N.D. Cal. 2007) (quoting *ASCII Corp. v. STD Entm't USA, Inc.*, 844 F. Supp. 1378, 1381 (N.D. Cal. 1994)). This policy favoring a stay is consistent with the legislative intent because

> Congress instituted the reexamination process to shift the burden of reexamination of patent validity from the courts to the PTO. ... Patent validity is a commonly asserted defense in litigation and courts are cognizant of Congress's intention of utilizing the PTO's specialized expertise to reduce costly and timely litigation.

Canady v. Erbe Elektromedizin GmbH, 271 F. Supp. 2d 64, 78 (D.D.C. 2002) (citations omitted). *See also*, *Digital Magnetic Systems, Inc. v. Ansley*, 1982 U.S. Dist. LEXIS 12395, *2 (W.D. Okla. 1982) ("Congress enacted the reexamination procedure to provide an inexpensive, expedient means of determining patent validity which, if available and practical, should be deferred to by the courts.")

In deciding on a motion to stay, courts consider three factors:

> (1) whether discovery is complete and whether a trial date has been set; (2) whether a stay will simplify the issues in question and trial of the case; and (3) whether a stay would unduly prejudice or present a clear tactical disadvantage to the non-moving party.

Tse, 2007 U.S. Dist. LEXIS at *5.

A stay pending reexamination of the patent is particularly favored at the early stages of litigation. *See, e.g.*, *Tse*, 2007 U.S. Dist. LEXIS at *5 ("A stay is particularly appropriate for cases in the initial stages of litigation or in which there has been little discovery."); *KLA-Tencor Corp. v. Nanometrics, Inc.*, 2006 U.S. Dist. LEXIS 15754, *5 (N.D. Cal. 2006) ("The early stage of a litigation weighs in favor of granting a stay pending reexamination." Granting a stay although the parties had "propounded their first set of requests for the production of documents, and [one party] had responded ...." *Id.* at *6.)

In this case, all that has happened is that the complaint was filed and served. Nothing else has transpired and a stay is clearly appropriate under the three factors commonly considered.

First, discovery has not begun and no case schedule has been set. A trial date has also not been set. *See*, *Sorensen v. Black & Decker Corp.*, 2007 U.S. Dist. LEXIS 66712, *11 (S.D. Cal. 2007) (granting a stay although "substantial amounts of discovery have already occurred," yet noting that "the more relevant inquiry is whether discovery is nearing completion -- it is not.")

Second, the reexamination of the '481 patent will likely simplify issues because all claims are under reexamination on multiple grounds. Stahl Dec., Ex. C, pp. 23, 26-31. Also, "the PTO cancels all claims in approximately twelve percent of all reexaminations and changes some claims in approximately sixty-four percent." *Tse*, 2007 U.S. Dist. LEXIS at *9. Thus, there is a high probability that issues in questions will be simplified as a result of the reexamination of the '481 patent.

Third, a stay in this case would not unduly prejudice I-Flow because the case is in its early stages. *KLA-Tencor Corp.*, 2006 U.S. Dist. LEXIS at *7 ("Granting a stay does not cause the nonmoving party undue prejudice when that party has not invested substantial expense and time in the litigation." And "parties having protection under the patent statutory framework may not 'complain of the rights afforded to others by that same statutory framework.'" (Citations omitted.)). I-Flow has not "invested substantial expense and time" in this case and it would therefore not be unduly prejudiced. There also is no tactical disadvantage to I-Flow because there have been no rulings in this case. *Tse*, 2007 U.S. Dist. LEXIS at *12.

In summary, a stay of this case would be proper should the Court decide not to dismiss this case under Rule 12(b)(6).

CONCLUSION

Zone therefore moves for an order dismissing this case under Rule 12(b)(6) under the doctrine of claim splitting. In the alternative, should the Court not grant a dismissal, Zone moves for an order staying this case pending resolution of a reexamination of the '481 patent in the Patent Office.

Respectfully submitted,

DATED: January 30, 2008 STAHL LAW FIRM

By: s/Norbert Stahl
Norbert Stahl, Esq.

Attorney for Defendant Zone Medical, LLC

CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2008, I electronically filed the foregoing document entitled:

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT UNDER FED. R. CIV. P. 12(B)(6).

with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail address:

boris.zelkind@kmob.com (Boris Zelkind).

I certify and declare under penalty of perjury under the laws of the Sate of California that the foregoing is true and correct.

Executed on January 30, 2008, at San Carlos, California.

By: s/Norbert Stahl
Norbert Stahl, Esq.

Attorney for Defendant Zone Medical, LLC